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In The

Supreme Court of the United States

October Term, 1987

CYNTHIA A. FORRESTER,

Petitioner,

vs.

JUDGE HOWARD LEE WHITE,

Respondent.

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. THE GOAL OF EFFICIENT ADMINISTRATION OF THE JUDICIAL SYSTEM DOES NOT JUSTIFY EXPANDING THE DOCTRINE OF JUDICIAL IMMUNITY.

Although the positions of the parties in this matter diverge significantly in many respects, both Petitioner and Respondent agree with the proposition articulated by the Seventh Circuit in its opinion in this matter, at A-7, that the scope of the doctrine of judicial immunity is inherently limited by the policy considerations which justify it. The opinion of the Court of Appeals, at A-7, and the briefs of Respondent, at 4, and of the Amicus, at 7, acknowledge that the major policy consideration underlying the doctrine is the public interest in principled, independent judicial decision-making. However, despite giving lip service to this proposition, the Seventh Circuit's justification for its ruling is based primarily on policy considerations outside the traditional justification for the imposition of the doctrine.

The Seventh Circuit declares that judicial immunity is "needed to promote the effective administration of our legal system." (A-21) Respondent justifies the imposition of the doctrine by the modern judge's need to control his working relationship with staff members, upon whom he must rely for skill, discretion and integrity. (Brief of Respondent, 10-11) The Illinois Judges Association urges the Court to apply the doctrine of judicial immunity to assure that judges are able to carry out their judicial functions "efficiently and independently," working only with probation officers in whom they have "total trust." (Brief of Amicus Curiae, 4)

While good working relationships with reliable judicial staff members and efficient administration of the judicial system are laudable goals, they are not the goals which the doctrine of judicial immunity was designed to accomplish. Throughout its history, the doctrine's protection has been extended only to those situations where it is *essential* to assure principled, independent judicial decision-making and to shield judgments from collateral attack. (See Brief of Petitioner, 10-12) It is the threat of lawsuits against judges by disgruntled litigants, a problem unique to judges because of their role in dispute resolution, which impedes the accomplishment of these goals.

Moreover, the goal of efficient judicial administration and desire for competent judicial staff members are not advanced by the extension of the doctrine of judicial immunity. The availability of a cause of action against judges for employment discrimination neither threatens a judge's ability to maintain good working relationships with competent, trustworthy staff members, nor impairs the efficient functioning of a court system. In fact, personnel decisions based on characteristics like sex and race, rather than careful examination of the skills and attributes of the individual employee, pose a greater threat to the efficient, productive operation of any enterprise, public or private. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

As the Second Circuit correctly acknowledges, there is an inherent tension between the imposition of the doctrine of judicial immunity and the constitutional rights of judicial employees. (A-9) Although "some instances of injustice" may be justified by the important objective of promoting principled, independent judicial decision-

making, the denial of constitutional rights is rarely justified by considerations of efficiency. *See, e.g., Frontiero v. Richardson,* 411 U.S. 677 (1973). Even if it could be argued that the goal of efficient and effective judicial administration could be advanced by barring employment discrimination suits against judges, that objective must be weighed against the injustice caused by stripping employees of the remedy for violation of important constitutional rights. If such considerations are used to justify the expansion of the doctrine of judicial immunity to bar employment discrimination suits against judges by even some judicial employees, there is great potential for expansion of the doctrine beyond its traditional parameters. One commentator has cautioned that "the doctrine may be a house of cards" which could easily topple once its narrowly drawn historical limits are crossed.[1]

II. RECENT DECISIONS OF THE COURTS OF APPEALS SIGNAL UNWARRANTED EXPANSION OF THE DOCTRINE OF JUDICIAL IMMUNITY.

Two recent decisions of the U.S. Courts of Appeals underscore the potential for unwarranted expansion of the

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1. Note, *An Argument Against Judicial Immunity for Employment Decisions,* 11 Nova L.Rev. 1127, 1147 (1987). The Seventh Circuit's decision in the instant case has been severely criticized in two other scholarly articles published since its issuance. *Forrester v. White: Personal Consequences of Personnel Decisions: Extending Judicial Immunity to Employment Discrimination by Judges,* 71 Minn. L.Rev. 1068 (1987); *Immunity Doctrines and Employment Decisions of Judges,* 55 Fordham L.Rev. 621 (1987).

doctrine.[2] In *Crooks v. Maynard*, 820 F.2d 329 (9th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3166 (U.S. Aug. 21, 1987) (No. 87-299), the Ninth Circuit rules that although a line can be drawn between judicial and administrative acts, such a distinction "ignores the reality of present day judging," 820 F.2d at 332, and is "useless in fixing the limits of judicial immunity." 820 F.2d at 329. Misstating the common law rule, the court holds that judges are immune from damage liability for acts performed in their *official* capacities, 820 F.2d at 331-332, and rules that the judge in question "acted in a judicial capacity when he entered and sought to enforce an order that, while directed at what might be perceived to be an administrative problem, was within his power to enter." 820 F.2d at 333. It should be noted that the plaintiffs in the *Crooks* case were court clerks, clearly not the kind of judicial employees who provide information and advice to judges.

James Ohse, the plaintiff, in *Ohse v. Hughes*, 816 F.2d 1144 (7th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3195 (U.S. Sept. 8, 1987) (No. 87-413), was an adult probation officer in an Illinois county who brought an employment discrimination action against three judges who made the final decision to terminate his employment. The Seventh Circuit opinion in the case states explicitly that his job required "no personal or professional interaction" between him and the judges he sued in connection with his discharge. 816 F.2d at 1155. Clearly the court recognizes

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2. Another recent and better reasoned Court of Appeals decision is *Guerico v. Brody*, 814 F.2d 1115 (6th Cir. 1987) which adopts the rationale of *McMillan v. Svetanoff*, 739 F.2d 149 (7th Cir.), *cert. denied*, — U.S. —, 107 S. Ct. 574 (1986) and rules that a judge's employment decision is not protected by judicial immunity.

that his job did not involve him in judicial decision-making. Nevertheless, the court holds, as a matter of law, that judicial immunity shields the judges who made the final decision to discharge him. 816 F.2d at 1154. The Seventh Circuit rules that the judges' decision to terminate Ohse was a judicial act because it was made after a pre-termination hearing conducted in a "judicial manner." 816 F.2d at 1144. The court reasons that because the act was done in a judicial manner, it cannot be argued that the judges were acting in an executive, as opposed to judicial capacity. *Id.*

The decisions in *Crooks* and *Ohse* signal the toppling of the house of cards of judicial immunity. They reflect not only a misunderstanding of the doctrine, but also what Judge Cudahy, in his dissent to the *Ohse* opinion, calls "a bias in the cases toward granting absolute immunity to judges." 816 F.2d at 1157. The potential for this kind of bias was also noted by the majority opinion in *Crooks:* "Perhaps cases involving judicial immunity should not be decided by judges. At present, however, there is no escape for judges from this duty. Mass recusals would solve nothing." 820 F.2d 331. Judge Posner recognizes in his dissent herein, that this potential for bias results from judges' "vocationally sharpened sensitivity" in the judicial immunity area. (A-25) For this and other reasons (See Brief of Petitioner, 18-19), this area of the law cries out for a general rule. The Seventh Circuit fails to provide the necessary guidance: "We cannot set forth a general rule . . . ." (A-20) It is essential that this court enunciate a clear, unambiguous rule for the application of the doctrine of judicial immunity to employment discrimination cases. This Court must draw a bright line

between judges' acts of adjudication and other official, although not judicial, acts.

Respectfully submitted,

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